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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-5208

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October Term, 1976

EDWARD MARTIN McKENNA,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

Brief for Resp. in opposition

****

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

****

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BRIEF OF RESPONDENT NORTH CAROLINA

IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

****

OPINION BELOW

In State v. McKenna, filed May 14, 1976, and reported at 289 N.C. 668, the Supreme Court of North Carolina reviewed the judgment of the Wake County Superior Court, North Carolina, July 7, 1975, and found that defendant had a trial free from error and affirmed the decision of the Trial Court in all respects.

From the judgment below, petitioner has filed a Petition for Writ of Certiorari to the Supreme Court of North Carolina and the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN PERMITTING THE STATE TO INTRODUCE THE ALLEGED MURDER WEAPON?

II. DID THE TRIAL COURT ERR IN DENYING PETITIONER'S MOTION TO DISMISS THE CHARGE BECAUSE OF FAILURE TO SERVE THE WARRANT FOR ARREST AND THE INDICTMENT ON DEFENDANT?

III. SHOULD THIS COURT DETERMINE THE PROPER SENTENCE TO BE IMPOSED ON PETITIONER?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted by a true bill returned April 28, 1975, and was arrested pursuant to a valid warrant issued April 20, 1975, for the first degree murder of William Blaney Holland, Jr., on November 10, 1973, in Wake County, North Carolina. Defendant was tried before the Honorable Giles R. Clark, Judge Presiding, and a jury at the first July, 1975 Criminal Court Session of Wake County Superior Court. Defendant was found guilty of first degree mureer and was sentenced to death by a judgment dated July 7, 1975.

On voir dire testimony, Kenneth D. Brady, a treasury agent with the Bureau of Alcohol, Tobacco and Firearms, testified that he went to the defendant's home on March 26, 1975, accompanied by defendant who was then in custody on a charge of violation of the United States Gun Control Act in 1968.

Agent Brady had both an arrest warrant and a search warrant authorizing a search of defendant's premises. He was accompanied by State Bureau of Investigation Agent Marshal Evans who had a State search warrant. Both search warrants were read to defendant when the Agents arrived at his home. The officers searched defendant's home for firearms and seized all firearms and ammunition found on the premises, including State's Exhibit 23. At some prior occasion, SBI Agent Wesley Terry had entered defendant's home without a search warrant. At that time, he apparently saw the weapon in question in defendant's house. SBI Agent Marshal Evans also testified on voir dire that he searched defendant's home with Agent Brady and that he had a valid search warrant which he read to defendant upon entering defendant's home. The Trial Court found on the basis of testimony presented at voir dire that the search warrants were not based on information obtained by Officer Terry upon his prior entry into defendant's home, that both warrants were issued before Officer Terry entered defendant's premises, and that the weapon was lawfully seized by Agent Brady and was not the fruit of any official illegality. The Supreme Court of North Carolina affirmed the findings of the Trial Court as being based on competent evidence and held that they were conclusive upon appeal. Therefore, the admission into evidence of the weapon was proper and did not violate defendant's rights.

In all other respects, the evidence is substantially as set out in defendant's Petition for Writ of Certiorari to the Supreme Court of North Carolina.

ARGUMENTS

I. THE TRIAL COURT PROPERLY PERMITTED THE STATE TO INTRODUCE THE ALLEGED MURDER WEAPON, WHICH WAS SEIZED IN A SEARCH PURSUANT TO VALID SEARCH WARRANTS.

Defendant contends that the entry of Agent Wesley P. Terry, an investigator with the Bladen County, North Carolina, Sheriff's Department, into defendant's home, and the discovery of the weapon in question by Agent Terry, prevented the State from introducing the weapon into evidence. Admittedly, Agent Terry did not have the right to search defendant's home. However, the weapon was obtained by Agent Kenneth Brady, with the Bureau of Alcohol, Tobacco and Firearms, and Agent Marshal Evans of the North Carolina State Bureau of Investigation, who both had proper search warrants. The Trial Court found that Agents Brady and Evans had probable cause to believe that defendant's premises contained firearms in violation of both federal and State laws, but the search warrants were not based on information obtained by Officer Terry during his prior entrance onto defendant's premises, but were both issued before Officer Terry entered defendant's premises. The Trial Court concluded that the weapon was lawfully seized by Agent Brady and that it was not the fruit of any official illegality.

> "The trial judge made findings of fact substantially in accord with the voir dire testimony of the State's witnesses and, based on those findings, concluded as a matter of law that Agents Brady and Evans had probable cause to believe that defendant's home contained firearms in violation of federal and state laws and thus subject to seizure under a lawful search warrant. The court further concluded that the search warrants obtained by Agents Brady and Evans were not based upon information secured by Agent Terry when he entered defendant's premises on 26 March 1975, both warrants having been issued prior to such entry. The trial court concluded that the weapon identified as State's Exhibit 23 was lawfully seized by Agent Brady and was not the fruit of any official illegality. The motion to suppress was therefore denied and State's Exhibit 23 was received in evidence over defendant's objection. . . .

> "In the instant case, the findings of the trial judge that the search warrants under which Agents Brady and Evans acted were issued prior to Agent Terry's entry and were not based upon any information obtained by Agent Terry are fully supported by competent evidence presented on voir dire. These findings, therefore, are conclusive on appeal and this Court cannot properly set aside or modify them. See State v. Curry, 288 N.C. 660, 220 S.E.2d 545 (1975); State v. Thomas, 284 N.C. 212, 200 S.E.2d 3 (1973); State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Pike, 273 N.C. 102, 159 S.E.2d 334 (1968); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966), cert. den'd. 386 U.S. 911, 17 L.Ed. 2d. 784, 87 S.Ct. 860 (1967). Accordingly, the admission into evidence of State's Exhibit 23 was proper and not violative of defendant's Fourth Amendment rights. This assignment is overruled." State v. McKenna, 289 N.C. 668 (1976).

It is clear that the weapon was not seized in or as a result of an illegal search. Defendant, however, contends that "unless courts exclude evidence seized in a subsequent legal search which has previously been seized in an illegal search, the purpose of the Fourth Amendment and the exclusionary rule will be contravened." (Petition for Writof Certiorari of Petitioner McKenna, p. 5).

Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. . . . This prohibition applies as well to the fruits of the illegally seized evidence." (citations omitted) United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974). Here we do not have evidence obtained in an illegal search or seizure, nor is this evidence derivatively obtained as a result of an illegal search or seizure. The purpose of the exclusionary rule has in no way been violated by use of the weapon in question as evidence in the instant case. "The primary justification for the exclusionary rule then is the deterrence of police conduct that violates the Fourth Amendment rights." Stone v. Powell, 96 S.Ct. 3037 (1976). The purposes of a rule aimed primarily at deterring unlawful police conduct are not frustrated by permitting admission

into evidence of a weapon which was not seized as a result of unlawful police conduct even indirectly.

This Court has held that illegal actions of officers beyond their authority would not render inadmissible evidence which was properly seized even in the same transaction. United States v. Lee, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927); McGuire v. United States, 273 U.S.95, 47 S.Ct. 269, 71 L.Ed. 566 (1927). This Court has also observed that "facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively." United States v. Nardone, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

The weapon in this case did not become sacred simply because one officer improperly searched defendant's residence and noted the number of the gun. Agents Brady and Evans were properly in the house and searched the premises and seized the weapon pursuant to a valid search warrant. Their actions were in no way the results of independent, improper actions by Agent Terry or any other person. Application of the exclusionary rule "has been restricted to those areas where its remedial objectives are thought most efficaciously served." Stone v. Powell, 96 S.Ct. 3037 (1976); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974). Since application of the exclusionary rule to the circumstances of this case would in no way further the purposes of the rule, it should not be extended to the instant case.

II. THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO DISMISS THE CHARGE BECAUSE OF THE FAILURE TO SERVE THE WARRANT FOR ARREST AND THE INDICTMENT ON DEFENDANT.

Defendant argues that his Sixth Amendment rights had been violated by failure to serve a copy of the warrant and indictment on him. The Sixth Amendment to the United States Constitution provides that "The accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." The Constitution does indeed guarantee a defendant the right to be informed of the nature of the charges against him. However, it does not gurantee that any particular method or means must be used for conveying this information to defendant. The requirement is that defendant have the right to be informed of the charges, and where defendant is adequately informed in ample time to prepare for his defense, failure to serve the indictment upon defendant should not invalidate the judgment in any way.

> "The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction of acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1876); accord, Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962).

Regardless of whether a copy of the indictment was officially served upon defendant, he did have a copy of it well in time to prepare for trial. Defendant's own affidavit establishes that "he was not informed of the Grand Jury proceedings nor given a copy of the murder indictment against

him until over a week after the Grand Jury sat. Moreover, a capias instanter was served on defendant on 15 May 1975 informing him that he was under indictment for murder. Defendant was advised of the details of the charge by the officer who served the capias and also by his attorneys. He was arraigned and placed on trial on 7 July 1975. The record shows he had counsel at all times after 7 May 1975 and that no motion was ever made for a bill of particulars or for additional time in which to prepare his defense. These facts strongly suggest that defendant was sufficiently apprised of the charges against him and had adequate time to prepare his defense.

> "The usual practice, and the better practice in our view, is to serve defendant promptly with the arrest warrant. This would have informed him of the charges against him. Such service, however, is not a constitutional requirement of due process. Due process is satisfied if the defendant is adequately notified of the charge against him, is permitted to confront his accusers and witnesses with other testimony, has assistance of counsel, and is afforded adequate time to prepare and present his defense . . . . The record in this case indicates that defendant was afforded all the safeguards. No prejudice has been shown by failure to serve the warrant. If defendant needed additional information concerning the charge against him, a bill of particulars, as authorized by former G.S. 15-143 (now G.S. 15A-925), would have provided it." State v. McKenna, 289 N.C. 668 (1976).

Defendant's own affidavit indicates that he actually had a copy of the indictment even though it was not officially served upon him. He was served with a capias instanter informing him that he was under indictment for murder nearly two months before his trial. He was represented by an attorney. He could have requested a copy of the indictment or checked it in the records. He might have requested additional time for preparation of his defense. He did none of these things. The Trial Judge found after a voir dire hearing that defendant had shown no prejudicial denial of his constitutional rights. The Supreme Court of North Carolina agreed that apparently he felt that he could adequately prepare his defense. He was in no way denied his constitutional right to be informed of the charges against him.

III. THIS CASE SHOULD BE REMANDED TO THE NORTH CAROLINA SUPREME COURT FOR VACATING OF THE DEATH PENALTY AND PROPER SENTENCING.

Defendant appears to argue that this Court should determine defendant's proper sentence after the death penalty is vacated or provide standards for the North Carolina Courts to use in re-sentencing defendant. Once the invalidity of the death sentence is recognized, however, sentencing is properly a matter of the courts in the State in which defendant was tried and convicted.

> "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see Radvinowicz, The History of English Criminal Law: The Movement for Reform, 1750-1833, Rassim, these are perculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. See 7 Edw. VII, C. 23, §4(3); 16 & 17 Geo. V, C. 15, §2(4). This Court has no such power." Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed. 2d 1405, reh. denied 358 U.S. 858, 79 S.Ct. 13, 3 L.Ed. 2d 92 (1958).

The Supreme Court of North Carolina has already dealt with cases presenting this same question. In State v. Davis, 290 N.C. 511 (1976), the Supreme Court of North Carolina ruled that the punishment for persons sentenced to death under the reasoning of State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), must be life imprisonment. The Court there vacated the death sentence and remanded to Superior Court of the appropriate county for directions to enter a judgment of life imprisonment. The Courts have followed this procedure in subsequent cases of this type coming before it. There is no need for the Supreme Court of the United States to intervene into this State-law matter. This Court should leave the Supreme Court of North Carolina and the Superior Court of

Wake County, North Carolina, where defendant was originally tried and convicted, free to determine the correct sentence for defendant in accordance with North Carolina law with due regard to the decision of this Court in Woodson v. North Carolina, 96 S.Ct. 2978 (1976).

CONCLUSION

Defendant had a trial free from error, and the Supreme Court of North Carolina correctly reviewed and affirmed the conviction. The Supreme Court of North Carolina is taking proper steps to vacate the death penalty and insure that a proper sentence is determined in all those cases for which the defendants were given the death sentence in violation of their constitutional rights.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted, this the 5th day of October, 1976.

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